

Maine Citizen Trade Policy Commission



Senator Margaret Rotundo, Co-Chair

Representative John Patrick, Co-Chair

June 16, 2006

Christopher Melly, Director, Services Trade Negotiations
Daniel Watson, Director, Services Trade Negotiations
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Dear Mr. Melly and Mr. Watson:

We are writing to you on behalf of the Maine Citizens Trade Policy Commission. The Commission is a public body created by an act of the Maine Legislature to examine both the economic opportunities for the State of Maine provided by the expanding number of trade agreements to which the U.S. is party, and also the possible impacts of new trade disciplines on U.S. federalism, particularly as they pertain to Maine's ability to regulate in the public interest. With this in mind, the Commission has taken a particular interest in current negotiations pertaining to the General Agreement on Trade in Services. We are writing today out of concern about three matters pertaining to current GATS negotiations:

1. Negotiations on "domestic regulation" in the WTO's Working Party on Domestic Regulation. The WPDR has been asked to develop binding rules for implementation of GATS Article VI.4, to ensure that regulations are "not more burdensome than necessary to ensure the quality of the service." We have previously expressed our concerns that the creation of a test of "burdensomeness" or "necessity" could shift the standard for regulation away from the constitutionally-protected "rational basis test" to one which is far more restrictive of state authority. We also have communicated our concern that limiting regulations to those necessary to "ensure the quality of the service" would preclude a whole range of non-discriminatory policies that seek to protect broader public interest in relation to the provision of that service. Recent proposals circulated in the Working Party on Domestic Regulation have also expressed hostility to sub-federal regulatory authority by noting that regulations must relate to "national policy objectives," thereby restricting the ability of states to adopt standards that may be different than those advanced at the federal level. This ability, of course, is at the heart of U.S. federalism.

With these concerns in mind, we urge USTR to:

- Reject any proposal brought before the WPDR for consideration that would include a "necessity test," and/ or include language that would confirm the prerogative of

legislative bodies to make the final determination of what constitutes “necessity” or “relates to” standard.

- In our view, any adoption of a “necessity” or “relates to” standard makes it essential that the U.S. Schedule of Commitments be modified so as to note a horizontal limit on commitments so that, for purposes of Domestic Regulation rules, legislative bodies retain final authority regarding what constitutes “necessity” or a “relates to” standard.
- Preserve fully the rights of states to regulate all aspects of a service, by seeking the broadest possible definition of what regulatory measures relate to the “quality of the service.”
- Reject references to “national policy objectives,” or modify this language to include “national *and sub-national* policy objectives.”
- Safeguard state oversight of professional licensing procedures and use of education/qualification requirements. We look forward to working with USTR and the appropriate authorities in Maine who develop and implement licensing procedures and examinations to develop the appropriate safeguards.

2. Impacts of new GATS sectoral commitments on the ability of Maine to regulate the siting and construction of a Liquid Natural Gas (LNG) facility. As you are no doubt aware, currently there are several entities seeking a license from the Federal Energy Regulatory Commission (FERC) to develop on- or off-shore LNG facilities in the State of Maine. At least one of those entities includes foreign ownership. In the 2005 Energy Policy Act, Congress gave FERC authority to license LNG facility siting, while explicitly preserving state authority to review applications to site coastal facilities. The FERC describes this on its website as having preserved a “virtual veto” power for states. At the same time, however, foreign LNG suppliers have already complained (explicitly in the case of California) that the dual federal-state LNG regulatory oversight system is overly burdensome.

We wish to therefore remind USTR that:

- Maine has requested a carve-out from any new GATS sectoral disciplines, including those pertaining to bulk storage of fuels and pipeline transportation of fuels—both of which would be part of any coastal LNG facility.
- States worked actively with their Congressional delegations to preserve state regulatory authority on LNG siting decisions in the 2005 Energy Policy Act, and would therefore take a dim view of any “end-around” of state authority through commitments on GATS—including new rules on domestic regulation that imposed tests regarding whether particular regulations were “related to the quality of the service.”

3. USTR’s continued failure to address concerns raised in previous letters from the Maine Citizens Trade Policy Commission. The lack of meaningful consultation regarding proposed new GATS commitments led us to conclude that it would be most prudent for Maine to seek a carve-out from new GATS commitments until such time as the Commission—which includes representatives from all three branches of government, plus the Maine State Point of Contact with USTR—has had an opportunity to study the potential impacts of such new commitments on Maine’s regulatory authority.

Given impending deadlines for completion of modalities in the WTO Doha Round negotiations, and given the June 19th meeting of the Working Party on Domestic Regulation—for which the Chair has indicated that he hopes to forward a “consolidated text” to the General Council on Services regarding Domestic Regulation disciplines-- **the members of the Maine Citizens**

Trade Policy Commission request that USTR negotiating staff brief members of the Commission regarding current negotiations in the WPDR, the content of any texts emerging from the Working Party, and any other issues pertaining to GATS “domestic regulation” rules or new sectoral commitments, as soon as is practicable following the June 19th meeting.

We appreciate the opportunity to raise these concerns with you and look forward to your earliest possible reply. With very best wishes.

Sincerely,

Senator Margaret Rotundo
Co-Chair

Representative John Patrick
Co-Chair

cc: Tiffany M. Moore, Assistant USTR, Intergovernmental Affairs and Public Liaison
Christina Sevilla, Director, Intergovernmental Affairs